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IN THE

Supreme Court of the United States

October Term, 1950

No.

OTIS BEALL KENT, *Petitioner,*

v.

AUSTIN F. CANFIELD, LESTER WOOD, and ELIZABETH D. COLEMAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a Writ of *Certiorari* issue to review a *Per Curiam* Order entered by the United States Court of Appeals for the District of Columbia Circuit, on June 23, 1950, dismissing the appellant's appeal from three summary judgments of the United States District Court for the District of

Columbia, dated June 2nd, 13th and 15th, 1949, respectively, dismissing the appellant's complaint against the respondent appellees, in a civil action for Malicious Prosecution and other actionable torts including *CONSPIRACY in FURTHERANCE of BLACKMAIL* (R. 296).

OPINIONS BELOW.

No opinion was rendered in this cause by the Court of Appeals; but its Order hereby sought to be reviewed is set forth on page 296 of the Record. The subject Orders of the District Court, and the comments of the Pre-Trial Judge incidental thereto, are of record in the herewith submitted Joint Appendix, pages 230-233; 235-258.

JURISDICTION.

The Order of the Court of Appeals here in question was entered on June 23, 1950. (R. 296.) The jurisdiction of this Honorable Court is invoked under Title 28 U. S. C., Sec. 1254-(1); June 25, 1948, C. 646, 62 Stat. 928.

QUESTIONS PRESENTED.

This case involves four questions:

I. Whether the judicial powers and prerogatives of Federal District and Appellate Courts should be permitted by this Honorable Court to immunize a confederation of attorneys from the just and lawful consequences of their gross and deliberate slander and malicious prosecution of another attorney, and of their conspiracy amongst themselves and with others in furtherance of the long-continued efforts of a notoriously immoral woman to have extorted an unconscionable sum of money from him by threats of defamation and by other expedients of blackmail.

II. Whether this Honorable Court, in the exercise of its *corrective powers of supervision* over the proceedings of Federal, District and Appellate Courts, should scrutinize and if found improper rescind the action of a District Court in granting a motion for summary judgment filed by ONE of EIGHT defendants jointly and severally charged with actionable liability on five separate counts, including a charge of CONSPIRACY IN FURTHERANCE OF BLACKMAIL, on a stated finding by the Pre-Trial Judge of "no genuine issue as to a material fact," *without his having read the related pleadings and affidavits of record before him or having otherwise informed himself as to the actual presence in or absence from the record of any said issue involving the moving defendant,* and in further dismissing the *entire* complaint as to *three other* codefendants, without discussion or consideration of the merits or the lack of merit in said complaint, and solely on the basis of his antecedent action on the original motion.

III. Whether an appeal from summary judgments severally entered in the aforegoing circumstances may lawfully have been dismissed because of the appellant's failure to have filed his brief on time, *on motions to dismiss filed eleven days after the appellant's tender of his brief for filing,* where the requisite filing copies thereof, correctly addressed and duly forwarded by the printers in New York directly to the Clerk of the Court of Appeals in Washington, D. C., had been received in good order by the Washington Post Office, *at least four hours before the expiry of the due date, with fully prepaid postage for Special Delivery Service,* but were NOT DELIVERED to the Clerk of the Court until the morning of the day after their timely arrival in Washington, as aforesaid.

IV. Whether an appeal from the summary judgments aforesaid may lawfully have been dismissed by the Court of Appeals, on the incompatible grounds of (1) the appellant's failure to have filed his brief on time, AND (2) a *finding* by the Court of "scandalous" and "impertinent" matter in his UNFILED brief.

STATEMENT OF FACTS.

1. The petitioner, a citizen of the United States and a resident of the State of Maryland, now retired from active practice of the law, has been a member of the Bar of this Court for nearly forty years. The respondents Canfield and Wood reside in Washington, D. C., and are practicing attorneys in the District of Columbia. The respondent Elizabeth Coleman, a registered nurse of an address unknown to the petitioner, during all the times material to the facts here in issue, was officially identified with the Graduate Nurses' Association of the District of Columbia.

2. The respondent was named as defendant in a $700,000.00 slander and breach of promise suit, initiated and actively prosecuted for nearly seven years by the respondents Canfield and Wood, in collaboration with other attorneys named in the complaint, on behalf of one Margaret Buchanan, likewise a registered nurse, who had attended the appellant's mother in her last illness in 1940.

3. Following a judgment on all counts in his favor in 1946, the petitioner sued the appellees and other named defendants concerned with the aforesaid litigation, for SLANDER, MALICIOUS PROSECUTION, ILLEGAL ISSUE AND ABUSE OF JUDICIAL PROCESS, ATTEMPTED EXTORTION BY THREATS

OF DEFAMATION AND CONSPIRACY IN FURTHERANCE OF BLACKMAIL. (R. 1.)

4. One of the attorney defendants moved for a summary judgment on the asserted *but controverted* ground that the complaint presented with respect to himself no genuine issue as to a material fact. (R. 90.) The petitioner, as plaintiff in the District Court, duly filed his sworn opposition to the motion (R. 102) which thereupon came on for hearing, NOT IN MOTIONS COURT, in conformity with the established practice of the Federal Courts in similar cases, but BEFORE THE PRE-TRIAL JUDGE, whose regular assignments related to *pre-trials on the merits,* and NOT to motions.

5. The tacitly admitted failure of the Pre-Trial Judge to have read and familiarized himself with the voluminous pleadings of record before him was distinctly recognized by counsel for the movant, as clearly indicated by his comment to the Court: "All I can suggest, because of the length of the documents submitted, is that at your leisure you examine the papers in support of this motion"; to which the Pre-Trial Judge replied: "I would rather have you summarize them orally; I always prefer oral argument." (R. 237.)

6. The attorney for the moving defendant thereupon essayed a summarization of the cumulative record *comprising 174 pages of the Printed Appendix*; his responsive exposition of his own comprehension of the factual issues underlying his motion for a summary judgment *being fully set forth on less than five printed pages of the Appendix.* (R. 235-240.)

7. The plaintiff's attorney, in response to a gesture from the Court, then undertook to argue the merits of

the plaintiff's opposition to the motion; but he very shortly admitted the disqualifying inadequacy of his own familiarity with and understanding of the record, and his consequent inability to proceed further in that effort. He finally requested that the plaintiff be permitted by the Court to conclude the argument in his own behalf. (R. 250.)

8. The requested permission having been reluctantly given by the Pre-Trial Judge, the plaintiff denied and in effect repudiated the admissions ineptly conceded by his insufficiently informed attorney, and otherwise endeavored to elucidate and clarify the factual issues a correct understanding of which by the Court was indispensable to a just and proper adjudication of the motion for summary judgment. After *less than five minutes* of introductory comments, however, anent the vitally material issues embodied in *sixty-three pages of the complaint,* the plaintiff was peremptorily foreclosed from any further responsive discussion by the brusque and inconsiderate statement by the Court that: "I do not think I care to hear anything further along that line. You asked for three minutes. Your three minutes are up. You have been stating matters and making assertions that have nothing to do with this lawsuit. I do not think I care to hear anything further. I have heard your counsel at length." (R. 253.)

9. It will clearly appear from even a casual reference by this Honorable Court to the reporter's transcript of the material colloquy (R. 235-254) that the Pre-Trial Judge, at the time of his final action on the aforementioned *original* motion, did not remotely appreciate nor understand the determinative facts involved in the manifold issues of record before him; yet,

he none the less granted the motion for summary judgment, and dismissed the *entire* complaint as to the moving defendant, on the *single ground* of his declared inability to find "the least basis for a charge of actual malice as against" him; *none of the other four counts comprehended in the complaint being mentioned in the Order of dismissal.* (R. 254.)

10. In due course thereafter, the respondent appellees and codefendants in the District Court severally moved for summary judgments on the identical grounds upon which the Court had allowed the original motion; and the same Pre-Trial Judge, *without a semblance of argumentative discussion on the merits,* granted all three motions. (R. 255-258.)

11. From the three latter-mentioned Orders granting summary judgments to the respondent appellees, the plaintiff and now petitioner seasonably appealed to the United States Court of Appeals for the District of Columbia Circuit. (R. 298.)

12. The Court of Appeals set March 16, 1950, as the ultimate filing date for the appellant's brief and joint appendix. (R. 298.) A copy of the joint appendix was duly served by mail on each of the appellees on March 15, 1950, and forty copies of said record were likewise duly filed by the appellant with the Clerk of the Court of Appeals on the due date thereof.

13. At 5 P. M. on March 15, 1950, the Batavia Times Publishing Company of Batavia, New York, mailed service copies of the appellant's brief to all the appellees, and at the same time mailed forty copies of the brief for *Special Delivery,* together with an affidavit of service, to the Clerk of the Court of Appeals in Wash-

ington, D. C., and *so notified him by telegram.* (R. 259.)

14. The filing copies of the appellant's brief arrived in Washington, D. C., on the morning of March 16, 1950, *under fully prepaid postage for Special Delivery service,* and were delivered to the Clerk of the Court for filing in the early morning of March 17, 1950. (R. 259.)

15. On March 23, 1950, the appellant filed with the Clerk of the Court of Appeals a motion for leave to file his brief *nunc pro tunc,* as of a date not later than March 16, 1950. (R. 259.)

16. On March 26 and 31, 1950, the appellees Canfield and Wood filed their respective oppositions to the appellant's motion, and moved also to dismiss his appeal. (R. 268-279.)

17. The appellant's motions for leave to file his brief *nunc pro tunc* was denied, and the appellees' motions to dismiss the appeal were granted on May 4, 1950. (R. 296.)

18. On May 19, 1950, the appellant moved for a reconsideration by the Court of Appeals of his motion for leave to file his brief *nunc pro tunc*; but on June 23, 1950, that motion also was denied. (R. 299.) The Order of the latter date is hereby sought to be reviewed by this Honorable Court.

SPECIFICATIONS OF ERRORS TO BE URGED.

1. The District Court erred in holding that the *entire* complaint in a civil action involving *five* separate counts, *including a charge of conspiracy in furtherance of blackmail,* may lawfully have been dismissed as to

any of the eight named codefendants, including the respondents herein, on the single ground that the only count considered by the Pre-Trial Judge presented as to its proponent no genuine issue involving a material fact, *without having first determined whether or not the complaint, the traversing answer and the affidavits of record in the case presented a genuine issue* (1) as to the existence or the non-existence of a conspiracy; (2) as to the moving defendant's actionable participation therein; and (3) as to the *individual liability* of the moving defendant *under any of the other four counts in the complaint.*

2. The Court of Appeals for the District erred in granting the respondent appellees' motions to dismiss the appeal herein because of the appellant's failure to have filed his brief until the *early morning following the afternoon* on which it was due, where the motions to dismiss were interposed *eleven days or more after the appellant's tender of his brief for filing,* and no prejudice had been suffered by any of the appellees by reason of the slight delay, which had been *fully explained* by the appellant, as unavoidable or *purely accidental* so far as he was concerned; the *delinquent filing* of the brief having been *attributable finally and solely* to the failure of the Washington, D. C., *Post Office,* to have delivered the SPECIAL DELIVERY parcel containing the briefs, clearly showing on its face the need for haste in effecting its delivery, *within more than four hours* after its arrival in good order in Washington.

3. The Court of Appeals further erred in dismissing the appeal herein on the *incompatible* grounds of (1) the appellant's failure to have filed his brief on time,

and (2) a *finding* by the Court of "scandalous" and "impertinent" matter in his UNFILED brief.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The petitioner respectfully submits that a writ of certiorari should be granted in this cause, under subdivision 5-(b) of Rule 38 of the Practice Rules of this Honorable Court, because the *Court of Appeals for the District has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned or condoned such a departure by the Court below,* as to call for an exercise of the corrective powers of supervision of this Honorable Court; that is to say:

1. In failing to have observed the juridical obligations devolved upon him, incidentally and precedently to his granting of any of the motions for summary judgment in present controversy, as fully detailed in paragraph 1 of the aforegoing Specifications of Errors, *the Pre-Trial Judge so far departed from the accepted and usual course of judicial proceedings* in the Federal Courts, as not only to justify but in the public interest to require corrective action by this Honorable Court.

2. The arbitrary action of the Court of Appeals in dismissing the appeal herein, without affirming or reversing the erroneous action of the District Court from which the petitioner plaintiff had appealed, should be reviewed by this Honorable Court, and if found in error reversed, as having tacitly sanctioned or approved the above mentioned departure by the District Court from the accepted and usual course of judicial proceedings.

3. In granting the motions of the respondent appellees to have dismissed the appeal herein, because of

the appellant's failure to have filed his brief on time, in the apparently *unprecedented circumstances* detailed in paragraph 2 of the aforegoing Specifications of Errors, *ante*, the *Court of Appeals for the District has so far departed from the accepted and usual course of judicial proceedings* as to justify and require a summary exercise by this Honorable Court of its corrective supervisory powers.

4. The asserted grounds upon which the Court of Appeals dismissed the appeal herein were *incongruous* and *contradictory*, in that the Court specifically found (a) that the brief had not been filed on time and *could not be considered*; and (b) that the brief, *when considered*, had been found not to comply with the rules and also contained "impertinent" and "scandalous" matter. If ground (a) was correct, ground (b) was *de hors* the record. If ground (b) was sound, the Court had accepted the briefs for filing and ground (a) had become untenable.

5. The cited action of the Court of Appeals herein is in definite conflict with decisions of the United States Court of Appeals for the Eighth Circuit on the same matter. Thus, the Court of Appeals for the District has dismissed the instant appeal on motions of the appellees because of the appellant's failure to have filed his brief on time, *even though the motion to dismiss was not filed until after the appellant's brief had been tendered for filing.* The United States Court of Appeals for the Eighth Circuit, *au contraire*, in *Cramer* v. *Phoenix Mutual Life Insurance Company of Hartford, Connecticut*, 91 F-(2), 141, *declined to dismiss* an appeal because the appellants were three days late in filing their briefs, where *the brief had been filed before the*

motion to dismiss was interposed, the delay had been purely accidental and satisfactorily explained, and no prejudice had been suffered by the appellees. The same Court held in *American Insurance Company* v. *Scheufler,* 129 F-(2) 143, that the failure to file a brief within the time limited by the rules did not require the dismissal of an appeal, where the brief was filed before any motion had been made to dismiss the appeal, since "The default was therefore cured before any attempt was made to take advantage of it."

6. The decision of the Court of Appeals in the instant action is in direct conflict also with the *rationale* of at least three of its earlier decisions; it having been held in *Vogel* v. *Saunders,* 92 F-(2) 984, 68 App. D. C. 31, *Acker et al.* v. *H. Hurfurth, Jr., Inc.,* 110 F-(2) 241, 71 App. D. C. 244, and *United States* v. *Interstate Properties, et al.,* 153 F-(2) 465, 80 App. D. C. 392, that: "The Federal Rule is that a *motion to dismiss* on the grounds that the transcript has *not been filed within the prescribed time comes too late* when the transcript has *actually been filed.*"

7. It is thereupon respectfully submitted that this Honorable Court, in the exercise of its supervision over the aforementioned Appellate Courts, should finally determine the question of law herein last above propounded, in order that uniformity of decisions may prevail throughout the United States; and that the Writ should be granted on all the grounds set forth in the petition, for the reasons therein stated.

ARGUMENT.

A. The Writ of Certiorari should issue as prayed, because the Court of Appeals, in having dismissed the appeal herein, and in having thereby refused on purely technical grounds to review the erroneous action of the Pre-Trial Judge of the District Court, in dismissing the complaint as to four of eight named defendants, on a stated finding of no genuine issue as to a material fact, without having read the determinative pleadings and affidavits, or having otherwise informed himself as to the actual presence in the record before him a multiplicity of genuine issues as to material facts, has SO FAR SANCTIONED A FAR DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE IN THE FEDERAL COURTS, AS NOT ONLY TO JUSTIFY BUT IN THE PUBLIC INTEREST TO REQUIRE A REVIEW AND CORRECTIVE ACTION BY THIS HONORABLE COURT.

I. The Complaint herein Presented a Multiplicity of Genuine Issues as to Material Facts involving all the Defendants, including the Respondent Appellees.

As fully set forth in the complaint (R. 1-64), the instant proceedings are an outgrowth and *direct reaction* from a lawsuit *instigated* by the respondent Canfield against the petitioner in 1941, in which he actively collaborated with others of his codefendants in the District Court for nearly six years, and which subjected the petitioner to grave and slanderous public obloquy, and to total actual pecuniary COSTS AND LOSSES OF MORE THAN ONE HUNDRED THOUSAND DOLLARS. The substantive facts involved in the aforementioned suit, and the procedural history thereof in the District Court and in the Court of Appeals, are comprehensively set forth in the next hereto attached Appendix.

The Pre-Trial Judge made no effective effort to ascertain the existence in the record before him of a genuine issue as to a material fact. If he had even casually considered the complaint and the categorical denials by the moving defendants of its material averments, or the motions for summary judgments and the opposing memoranda and affidavits of the plaintiff, there would have been no occasion for his inquiry of counsel for the defendant Koenigsberger (R. 236): "WHAT IS THE ACTION ABOUT?"

There would have been even less excuse in that event for his having inquired of the plaintiff's attorney, after having indulged more than six printed pages of colloquy with the attorney for the moving defendant, and having heard the latter's argument in its entirety (R. 241): "WHAT IS THE ACTION ABOUT?"

A realistic consideration of every question thereafter interpolated by the Pre-Trial Judge (R. 236-254) will demonstrate his utter lack of understanding of any of the actual issues in the case inducing the ultimate finding whereupon his Order of dismissal was based that there was "no material issue of fact, because without proving actual malice the plaintiff may not prevail—can not prevail in fact".

If the Pre-Trial Judge had examined the authorities cited by the plaintiff in his opposition to the motion of the defendant Koenigsberger for a summary judgment, he might readily have refreshed his unquestioned knowledge of the legal proposition, that the malice imputed in an action for malicious prosecution need not be "actual malice", but may be judicially inferred from (a) *an absence or want of probable cause in the defendant's prosecution of the antecedent action;* (b) *a hostile attitude evinced by the defend-*

ants in their prior action against the plaintiff; and (c) *the magnitude of the claim asserted in the prior suit for excessive damages.*

If the Pre-Trial Judge had concerned himself, moreover, with a fair ascertainment of the *manifold genuine issues which he found did not exist* in the record, he would have understood that the plaintiff was legally entitled to have proved the charges in his complaint of actionable conspiracy on the part of all the defendants, including those at whose behest the complaint was dismissed; and that any substantial proof in support of that count would have entitled the plaintiff, as a matter of law as well as a matter of right and ethics, to have charged the defendant Koenigsberger not only with his own direct and deliberate acts inimical and injurious to the plaintiff, but with actionable responsibility for *every other offense charged in the complaint to every other participant in the asserted conspiracy*, to the same extent and exact legal effect as if he had individually so injured the plaintiff.

There were actually of record before the Pre-Trial Judge, therefore, when he granted the subject motions for summary judgment, *as many genuine issues as to material facts as there were charges in the complaint against all the eight defendants therein severally named, including of course the respondent appellees now before this Honorable Court.*

II. The Pre-Trial Judge, in granting the instant motions for summary judgments, evinced such a ruthless disregard for the established legal principles correctly determining the adjudication of such motions, as justly to have required a comprehensive review and corrective action by the Court of Appeals.

1. *Burden of Proving Non-existence of a Genuine Issue as to a Material Fact devolves upon Proponent of Motion for Summary Judgment*: The pleadings

underlying a motion for summary judgment in every instance import a *judicial inference* that the complaint thereby sought to be dismissed *presents at least one genuine issue as to a material fact;* and, while that presumption may be rebutted by an affirmative and positive showing to the contrary, the burden of proving that rebuttal, *unless successfully carried by the movant,* never shifts to the opposing party. As stated by the Court of Appeals for the District of Columbia in *Wittlin* v. *Giacalone,* 81 App. D. C. 20, 154 F-(2) 20, 21:

> It is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant.

In *Sprague* v. *Vogt,* 8 Cir., 150 F-(2) 795, 800, it was held that:

> On a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the Court.

"On a motion for summary judgment made by defendants *the facts alleged in the petition must be taken as true,* unless by the admissions, depositions, or other evidence introduced it appears beyond genuine controversy otherwise." *McCombs* v. *West,* 5 Cir., 155 F-(2) 601, 602. (Appellant's italics.)

So also in *Whiteman* v. *Federal Life Ins. Co.,* 1 F. R. D. 95, 96:

> *If there is* any question, the resolution of which is doubtful that is, *any question of fact,* then *that*

> *question ought not to be decided and cannot be decided upon the hearing of such a motion as this motion.* The parties are entitled to a jury trial, if they desire it, upon such essential questions of fact as are in the case, unless, indeed, they agree as to what the facts are. (Appellant's italics.)

To the same effect also were the decisions in: *Andrews* v. *Heinzman,* 9 F. R. D. 7; *Walling* v. *Fairmont Creamery Co.,* 8 Cir. 139 F-(2) 318, 322; *Wyant* v. *Crittenden,* 72 App. D. C. 163, 113 F-(2) 170; *Miller* v. *Miller,* 74 App. D. C. 216, 122 F-(2) 209; *Fishman* v. *Teter,* 7 Cir., 133 F-(2) 222; *McElwain* v. *Wickwire Spencer Steel Co.,* 2 Cir., 126 F-(2) 210; *Weisser* v. *Mursam Shoe Corp.,* 2 Cir., 127 F-(2) 344, 145 A. L. R. 467; *Standard Rolling Mills* v. *National Mineral Co.,* 2 F. R. D. 236; *Nye* v. *Mutual Benefit Life Ins. Co.,* 3 F. R. D. 308; *Electrical Fittings Corp.* v. *Thomas and Betts Co.,* 3 F. R. D. 256.

2. *Pre-Trial Judge Assuming to act on Instant Motions for Summary Judgments Legally Obligated to have Read and Comprehended All Related Pleadings and Affidavits of Both Parties, before dismissing Complaint:* The complaint herein detailed a myriad of actionable wrongs jointly and severally committed by the defendants, *from day to day through a continuous period of more than seven years,* and not unreasonably required for the delineation of those iniquities approximately sixty-three typewritten pages. The plaintiff's pleadings in opposition to the defendants' repetitious motions were likewise *of necessity* protracted. But if the Pre-Trial Judge whose acts are hereby sought to be reviewed had fairly and patiently examined the record, he must have realized the practical impossibility of any substantial abridgment of the plaintiff's pleadings, con-

sistently with his *manifest purpose to have presented ALL the facts upon which the District Court might fairly and justly have righted the wrongs which he had suffered at the hands of the defendants.*

All the answering defendants either were and are, or were and are represented by, able and astute lawyers; and if any of them had discerned any undue prolixity in any of the plaintiff's pleadings, their objections might readily have been recorded by a timely motion or motions to strike; but no such motion was ever filed by any of them.

Regardless then of any excess volume in the record before the Pre-Trial Judge, when he entered the several Orders here in question, he was *legally and inescapably obligated to have familiarized himself with the plaintiff's oppositions to the impending motions,* as well as with the motions themselves; and, if he had elected not to examine the record, for the stated reason (R. 237) that: "I think that long documents like that are really an imposition on the Court," or for any other reason, *he should in simple fairness have allowed the plaintiff sufficient time to have answered the questions which he had ineffectually propounded to counsel for both parties,* and to have presented the substantive facts in the case of which both attorneys had frankly admitted their lack of knowledge, and had declared themselves unable to discuss. The failure of the Pre-Trial Judge thereby to have vouchsafed to the plaintiff his Constitutionally guaranteed "day in court," was a reversible error which should have been but was not corrected by the Court of Appeals, *in conformity with its own controlling decisions in other cases.*

Thus, in *Wyant* v. *Crittenden,* 72 App. D. C., 163, 113 F-(2), 170, 173, it was held to be "incumbent upon the

court to take account of all the facts and allegations stated in both of the affidavits, not merely those set forth by defendant."

In *De Savitsch* v. *Patterson,* 81 App. D. C., 358, 159 F-(2) 15, 17, the Court observed:

> Where, as here, there is assembled for a trial judge a substantial amount of factual material, and he is asked to enter a judgment in favor of the defendant, *extreme care must be taken on the matter of deciding whether there is a "real issue" of fact.* (Petitioner's italics.)

To the same effect also, the Circuit Court of Appeals for the 7th Circuit held in *Campana Corporation* v. *Harrison,* 135 F-(2) 334, 335, that:

> *The Court* in such proceedings *is not permitted to try on the affidavits* submitted *an issue of fact which is presented by the pleadings.* In the case at bar, the *Corporation alleged* in its complaint that *it bore the burden of the tax* and that its dealings with the Sales Company were at arm's length. *The Commissioner* in his answer *denied these allegations. This presented sharp, clear, issues of fact.* Affidavits were filed to prove and to disprove these issues of fact, and *the Court on these conflicting affidavits undertook to resolve the conflict. This action of the court was not proper on the motion for summary judgment. The affidavits did not demonstrate that there were no issues of fact; they demonstrated that there were decided issues of fact.* (Petitioner's italics.)

The Third Circuit Court of Appeals, in *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F-(2) 1016, declared:

> It is now well settled that summary judgment may be entered for either party *if the pleadings,*

> *depositions, admissions on file and affidavits* show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Stated conversely, *a substantial dispute as to a material fact forecloses summary judgment* (citing *McKlwain* v. *Wickwire Spencer Steel Co.*, 2 Cir., 126 F-(2) 210; *Miller* v. *Miller*, 74 App. D. C. 216, 122 F-(2) 209; *Whitaker* v. *Coleman*, 5 Cir. 115 F-(2) 305). * * * *All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment.* *Weisser* v. *Mursam Shoe Corporation*, 2 Cir., 127 F-(2) 344. (Petitioner's italics.)

"A court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficiency, may summary judgment be entered against them." (*Moore's Federal Practice*, p. 3184; *Sartor* v. *Arkansas Natural Gas*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; *Friedman* v. *Washburn Co.*, 7 Cir., 145 F-(2) 715; *Campana Corporation* v. *Harrison*, 7 Cir., 135 F-(2) 334.) *Furton* v. *City of Menasha*, 7 Cir., 149 F-(2) 945, 947.

"In considering a motion for summary judgment, the pleadings upon which the motion is based are to be liberally construed in favor of the party opposing the motion." *Purity Cheese Co.* v. *Frank Ryser Co.*, 7 Cir. 153 F-(2) 88, 89.

In *Gasifier Mfg. Co.* v. *Ford Motor Co.*, 1 F. R. D. 10, 11, it was decided that, "In determining whether there is a disputed issue of fact, * * * the petition, the interrogatories, the affidavits, admissions, are all to be considered."

In *Doehler Metal Furniture Co.* v. *United States*, 2 Cir., 149 F-(2) 130, 135, 136, the Court observed that:

> Trial judges should exercise great care in granting motions for summary judgment. *A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable.* * * * Although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. * * * where, as here, damages are in question, *the courts should go slow about making haste by a summary judgment.* (Petitioner's italics.)

In *Andrews* v. *Heinzman*, 9 F. R. D. 7, the defendants contended that, since all the evidence available to the plaintiffs was already before the court, and was wholly inadequate to support the claim, summary judgment should be entered in their favor. The court, however, concluded that it could not "follow them to that extremity," and denied the motion on the stated finding that:

> The court, therefore, recognizing the issue in the pleadings, cannot and does not conclude that no further competent evidence, supportive of their claim * * * may be presented by the plaintiffs in the way either of written material, or of oral testimony by themselves or one of them, by the defendants or either of them, testifying for themselves or called adversely, or by disinterested witnesses.

B. The Writ of Certiorari should issue as prayed, in that the action of the Court of Appeals in dismissing the appeal herein, because of the appellant's slight and unavoidable delay in filing his brief, which he had properly tendered for filing in advance of the filing by the respondents of their motions to dismiss, IS IN CONFLICT WITH DECISIONS BY THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON THE SAME MATTER, AND IS LIKEWISE IN CONTRAVENTION OF ITS OWN UNCHALLENGED DECISIONS IN ANALOGOUS CASES.

As hereinbefore noted, the requisite filing copies of the appellant's brief were mailed directly by the printers in New York to the Clerk of the Court of Appeals in Washington, and were received by the local post office *in ample time to have permitted their delivery on the filing due date.* For reasons beyond the appellant's control, however, the briefs were not delivered to the Clerk for filing until the following morning, and were then rejected by the Court as filed too late. The appellant promptly moved for leave to file his brief *nunc pro tunc,* and fully and clearly explained the reasons which had precluded its timely filing as beyond his control, with an uncontroverted showing that none of the appellees had been prejudiced in any wise by the delay in the filing of his brief, but his motion was denied, and his appeal was summarily dismissed.

I. Conflicting Decisions of Eighth Circuit Court of Appeals.

In *Cramer* v. *Phoenix Mutual Life Ins. Co. of Hartford, Connecticut,* 91 F-(2) 141, the Circuit Court of Appeals for the Eighth Circuit said:

> At the very threshold of the case we are confronted with a motion to dismiss the appeals interposed by the appellees on the grounds (1) *that appellant's brief was not filed within the time re-*

> *quired by the rules of this Court* * * * appellants were *three days late* in the filing of their brief. The brief, however, was filed *before any motion to dismiss was interposed.* The *slight delay* has been *fully* and *satisfactorily explained* and was *purely accidental as far as appellants were concerned,* and in addition to this, *no prejudice has been suffered by the appellees by reason of the slight delay.* THIS GROUND FOR DISMISSAL IS WHOLLY UNTENABLE AND WILL BE GIVEN NO FURTHER CONSIDERATION. (Appellant's italics and capitals.)

In *American Insurance Co.* v. *Scheufler,* (8 Cir.) 129 F-(2) 143, 145, it was noted that:

> Appellees have with their brief filed a *motion to dismiss the appeal for failure to comply with the rules of this court.* Appellant's brief was not filed within the time limited by the rules of this court, but *it was filed before any motion was made to dismiss the appeal.* THE DEFAULT WAS THEREFORE CURED BEFORE ANY ATTEMPT WAS MADE TO TAKE ADVANTAGE OF IT. (Appellant's italics and capitals.)

II. Decisions of District Court of Appeals in Constructive Contravention of its Action hereby Sought to be Reviewed.

1. In *Vogel* v. *Saunders,* 68 App. D. C., 31, 92 F-(2) 984, 985, the issue involved was the delinquent filing of a transcript of record, and not of the appellant's brief as is here in issue. The reasoning applied in determining the procedural questions presented in either situation, however, must have been identical; and it is thereupon respectfully submitted that *the District Court of Appeals should have accepted and filed the appellant's brief herein, as duly tendered prior to the filing of the motions to dismiss,* on the authority of its rulings in the *Vogel Case,* that:

At the outset we are confronted with a motion to dismiss this appeal, on the ground that the transcript of record was not filed in this court within the sixty-day period prescribed by Rule 15. * * * Appellee points out that we have consistently granted motions to dismiss appeals where the transcript has been filed after the time limit prescribed by our rules. * * *

Appellant urges that our holding on this point is contrary to that of the Supreme Court and the lower Federal Courts in enforcing similar rules. *The Federal Rule is that a motion to dismiss on the ground that the transcript has not been filed within the prescribed time comes too late when the transcript has actually been filed. Bingham* v. *Morris,* 7 Cranch, 99, 3d L. Ed. 281; *Owlings* v. *Tiernan,* 10 Pet. 24, 9 L. Ed. 333; *Sparrow* v. *Strong,* 3 Wall. 97, 103, 18 L. Ed. 49; *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 28 S. Ct. 239, 52 L. Ed. 420.

After due consideration, we conclude that *the Federal Rule operates more effectively to accomplish the desired result.* Under that rule, *in order for an appellee to avail himself of the fact that appellant has not filed his transcript within the time prescribed, he must file a motion to docket and dismiss before such transcript is actually filed; if appellee waits until the transcript is filed, even though it be filed after the time prescribed, a motion to dismiss on this ground comes too late.*

WE ARE CONVINCED THAT NOTWITHSTANDING THE DECISIONS OF THIS COURT IN THE PAST TO THE CONTRARY, WE SHOULD ADOPT THE RULE FOLLOWED BY THE FEDERAL COURTS, AND THE SAME SHALL HEREAFTER BE REGARDED AS THE RULE OF PRACTICE ON THIS POINT. THE MOTION TO DISMISS IN THIS CASE IS ACCORDINGLY DENIED. (Appellant's italics and capitals.)

2. The aforegoing decision in the *Vogel Case,* reversing the practice theretofore observed by the Court of Appeals for the District in similar cases, was based upon its conformance with the decisions of this Honorable Court in *Bingham* v. *Morris,* 7 Cranch, 99, 3 L. Ed. 281; *Owlings* v. *Tiernan,* 10 Pet. 24, 9 L. Ed. 33; *Sparrow* v. *Strong,* 3 Wall. 97, 103, 18 L. Ed. 49; *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 28 S. Ct. 239, 52 L. Ed. 420; *Green* v. *Elbert,* 137 U. S. 615, 34 L. Ed. 792, 11 S. Ct. 188; *Richardson* v. *Green,* 130 U. S. 104, 32 L. Ed. 872, 9 S. Ct. 443, and has since been consistently followed by the Court in *Acker* v. *Herfurth,* 71 App. D. C. 244, 110 F-(2) 241; *United States* v. *Interstate Properties,* 80 App. D. C. 244, 153 F-(2) 465, 466.

It is respectfully submitted that the dismissal of the instant appeal, on the purely technical ground that the appellant had failed to file his brief on time, is in definite conflict with comparable decisions of the Circuit Court of Appeals for the Eighth Circuit on the same matter, and in contravention also of its own decisions in analogous cases, *reflecting thereby a clear and far departure from the accepted and usual course of procedure in the Federal Courts,* and in that respect, as well as because of irreconcilable conflicts between the cited decisions, clearly warrants a review and corrective or unifying action by this Honorable Court.

C. The Writ of Certiorari should issue as prayed, because the Court of Appeals, in having dismissed the appeal herein on the incompatible grounds of its exclusion of the appellant's brief from the record as not filed on time, and of a finding by the Court of "scandalous" and "impertinent" matter in his excluded brief and therefore dehors the record, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEDURE IN THE FEDERAL COURTS AS TO JUSTIFY AND REQUIRE A REVIEW AND CORRECTIVE ACTION BY THIS HONORABLE COURT.

If the Court of Appeals was correct in its refusal to accept and file the appellant's brief, *which it thereby excluded from the record,* the entire substance of the excluded brief was *dehors the record*; and there was therefore no legal warrant for an adjudication or characterization by the court of any part of the brief as "scandalous" and "impertinent" or otherwise.

The Appellate Court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record. *Holmes* v. *Trout,* 32 U. S. 171; *Kerr* v. *Clampitt,* 95 U. S. 188.

See also: *Hudgins* v. *Kemp,* 59 U. S. 530; *Davidge* v. *Simmons,* 266 F. 1018, 49 App. D. C. 398; *Pilger* v. *Sutherland,* 57 F-(2) 604, 61 App. D. C. 84; *Cave* v. *District of Columbia,* 90 F-(2) 383, 67 App. D. C. 138; *Chisholm-Ryder Co.* v. *Buck,* 65 F-(2) 735; *American Trust Co.* v. *Harris,* 88 F-(2) 541.

If on the other hand, the judicial consideration presupposed by the Court's condemnation of any part of the brief as "scandalous" or "impertinent" made and constituted the brief an integral part of the record, then the brief must be held to have been seasonably and otherwise properly FILED; and the denial of the appellant's motion for leave to file it *nunc pro tunc,* was

in effect the decision of a moot question, in contravention of the immemorially established practice in all courts.

D. The Writ of Certiorari should issue as prayed, and the erroneous and immunizing action of the District Court and of the Court of Appeals herein should be reversed, as an emphatic pronouncement to the Legal Profession and to the Public, that this Honorable Court will neither condone nor countenance any action by any attorney, either individually or through collaboration with others, the intended purpose or the consequential effect of which may be to secure an unrighteous advantage or unjust enrichment at the expense of any other individual, or any attempt by any said attorney, or by any conspiratorial association of attorneys who may have engaged in such a practice, to escape the just and merited consequences of their misdeeds, by a specious recourse to Judicial Process or otherwise.

The first of the "QUESTIONS PRESENTED" on page 2, *ante,* as to the powers and prerogatives of Federal Courts to so decide the issues submitted for their decision in any case, as to immunize the attorneys therewith concerned from the just and merited consequences of their deliberate slander, malicious prosecution and other actionable offenses of and against any other individual, was anticipated and eloquently answered by the statement of the Court, in *Kolka* v. *Jones,* 71 N. W. 558, 565, that:

> The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to society at large, if it is suffered to go unwhipped of justice. *If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken; and the courts themselves will seem to have for-*

saken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men. (Appellant's italics.)

CONCLUSION.

Wherefore, the petitioner prays that a Writ of Certiorari may issue in this Cause, under the Seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia; and that upon such review the Order of said Court here in question be vacated, reversed, and set aside, and that this cause be remanded to said Court, with instructions to proceed further in accordance with the views of this Honorable Court.

Respectfully submitted,

OTIS BEALL KENT,
Petitioner, In His Own Behalf.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

I. Substantive Facts in Antecedent Blackmail Suit.

1. As set forth *in extenso* in the complaint, a registered nurse known as Margaret Buchanan, client of and codefendant with the respondents Canfield and Wood, attended the petitioner's Mother in her last illness in 1939-40, and by her own later admissions was *promptly and fully paid for all her services.* In November, 1940, she suggested that the petitioner marry her, as she was tired of supporting herself and he should have some one to take care of him in his "last days." Upon his rejection of her proposal, she *demanded* that he *give* her a "pension of at least a thousand dollars per month" for the remainder of her lifetime, and *threatened* otherwise that she *and her attorneys would* "drag his precious name through the mud from one end of the world to the other." She further *admonished* him that, if he did not accede to their exactions, she *and her attorneys* would make his refusal cost him as much as or more than would have satisfied their demands upon him.

2. Up to the time of his last communication with her, in December, 1940, the petitioner had never inquired as to nor otherwise concerned himself with her antecedent history or reputation; but, following her aforesaid threats of extortion, he devoted many months to an investigation of her personal history, and eventually established the fact that *she had borne an illegitimate child to the undivorced husband of one woman, who had divorced him on that account, and that she had lived in open and notorious adultery with another undivorced married man, intermittently over a period of approximately nine years.*

3. After repeated and futile efforts to have induced one or another of several well-known attorneys to assist in her threatened effort to blackmail the petitioner, she found her way to the office of the respondent Canfield; and on Janu-

ary 10, 1941, the petitioner received a formal communication on the letter-head of said respondent, duly signed by an associate in his practice named Hannan, informing the petitioner of the writer's retention by Miss Buchanan to represent her interests in the matter of a purported claim arising out of her alleged prior "agreements and relations with" the petitioner. *No reference was made in the letter to any promise of marriage or to any breach of any said promise; no such claim or pretense ever having been made or mentioned to the petitioner by her or by anyone else.*

II. Procedural History of Blackmail Litigation.

1. After several months of ineffectual negotiations by the respondent Canfield with attorneys representing the petitioner, said respondent induced one Lawrence Koenigsberger, of the law firm of Simon, Koenigsberger & Young, to institute a suit against the petitioner, which said suit was filed in the District Court in September, 1941, with a claimed *ad damnum* of $700,000.00, for asserted slander and alleged breach of marriage promise; the defendant's original answer denying both charges.

2. The *respondent Canfield and his collaborating counsel, at the time of their institution of the aforementioned action, were fully informed as to the illegitimacy of their client's child*; and for more than three succeeding years they *not only admitted but insisted* that *the petitioner,* at the time of his alleged breach of his alleged promise of marriage, had been *wholly uninformed as to their client's antecedent unchastity.*

3. All said attorneys knew or were chargeable with knowledge of the legal premise that the prior unchastity of any woman plaintiff in a breach of promise suit, if unknown to the defendant at the time of the alleged breach, is UNIVERSALLY HELD TO CONSTITUTE AN ABSOLUTE DEFENSE TO HER ACTION; and said attorneys well knew, when they filed their subject suit, that *there was no probable cause or any other legal excuse for its being filed.* They further well knew or were chargeable with knowledge that their client's past record of unchastity would have pre-

cluded her recovery of anything more than *very nominal damages,* even if the petitioner had freely admitted a deliberate breach of an admitted promise to marry her; and their exaction in their suit of an *ad damnum* of $700,000.00 was *studiedly extortionate,* and as such subjected the plaintiff as well as all her attorneys to an *actionable charge of malicious prosecution.*

4. In or about the summer of 1942, the serious illness of the defendant Koenigsberger induced his withdrawal as the chief attorney for the plaintiff Buchanan, in whose behalf the respondent Canfield, almost a year thereafter, enlisted the services of the respondent Wood as her trial attorney.

5. The petitioner, upon his completion of his aforesaid investigation of the plaintiff's personal history, filed an amended answer to her complaint, averring among other defenses his prior lack of knowledge of her admitted unchastity; which amended answer the respondent Wood immediately moved to strike on various purported grounds, including his ill-advised and unfounded contention that the defense of unchastity is untenable in a breach of promise suit, unless the defendant breached his engagement on that account; and that the defendant in the instant suit could not have breached his alleged engagement to the then plaintiff because of her prior unchastity, *for the unanswerable reason that he had had no knowledge thereof at the time of the asserted breach.*

6. The motion to strike was denied; with permission however to the plaintiff to file "specific objections" to the amended complaint. In *purported* compliance with that condition, her attorney filed a *reassertion of his prior motion,* with no addition thereto of any clarifying objection; and on his *ex parte* argument, *without any objection by the defendant's attorney,* and without any effort having been made by either attorney to enlighten the Court as to the actual substance of the motion, it was granted; with directions to the defendant to refile his amended answer within ten days, with all his affirmative defenses involving the character or the reputation of the plaintiff expunged therefrom.

7. The defendant duly filed a notice of his intention to apply for a Special Appeal to the Court of Appeals; but before he had completed his petition, the ten days granted by the Motions Court having elapsed, the *plaintiff's attorney filed a motion for a judgment by default,* in that the defendant had not refiled his emasculated answer as required by the Order then in process of appeal. The motion for summary judgment was denied; but the Order of denial included also a direction to the defendant that he forthwith comply with the Order of the preceding Motions Judge, and refile his revised amended answer within the succeeding ten days.

8. The defendant then filed a notice of his intention to apply for a Special Appeal from the second Order of the Motions Court, which he promptly did; and *both Special Appeals were granted.* The requisite briefs were filed by both parties, and the *issues on appeal were argued by the appellant in his own behalf;* whereupon *the Court of Appeals reversed both Orders of the District Court,* and established as the law of the case in the District the elsewhere long-established proposition that the prior unchastity of the woman plaintiff in a breach of promise case, if proved and if unknown to the defendant at the time of the immediate breach, is a complete and absolute defense to her action.

9. Both the latter defined conditions having been met by the defendant in the then proceeding, he filed a motion for a summary judgment of dismissal of the breach of promise claims, the prior *repeated admissions* by the plaintiff's attorney that the defendant had been unaware of her admitted unchastity *having dissolved the only material issue presented by his motion* for summary judgment. The Motions Court, however, *without having read the supporting affidavit, refused to hear any argument in support of the motion,* which he thereupon peremptorily denied. The defendant declared his purpose to submit forthwith a petition for reconsideration of the motion; to which the Motions Judge replied that he would "deny that also." The petition, fully fortified by supporting affidavits, was duly filed; and the Motions Judge, *without having read the motion or*

the supporting affidavit, or having otherwise informed himself as to the *undeniable absence of any genuine issue* as to a material fact, denied the petition for reconsideration of the defendant's prior motion for a summary judgment.

10. It may not be amiss, therefore, to invite the attention of this Honorable Court to the anomalous situation presented by the refusal of the Motions Court to have granted the petitioner defendant's motion for a summary judgment, on his showing of record that the complaint and the amended answer, when considered in the light of the aforementioned Appeals decision, had forever eliminated the only issue involved in the breach of promise suit, with the result that *there was in fact and in law* at the time he filed his motion *NO GENUINE ISSUE AS TO A MATERIAL FACT.* Yet the Motions Court, in the present instance, dismissed the complaint of the present plaintiff and then defendant, without having informed himself as to and having verified the *undeniable fact that the record before him actually presented a multiplicity of GENUINE ISSUES AS TO MATERIAL FACTS.*

11. Upon the denial by the Motions Judge of the petitioner defendant's motion for a summary judgment, and of his petition for reconsideration thereof, as aforesaid, he petitioned the Court of Appeals for Special Appeals from both Orders of denial; but the Court of Appeals denied both petitions. He promptly filed a petition for reconsideration of the latter-mentioned action of the Court of Appeals; and that also was denied. He was thereby left no recourse than to defend himself as best he might in a protracted trial in open court; *resulting eventually in a verdict by the Jury on all counts in his favor,* but subjecting him in the meantime to immeasurable distress and unmerited embarrassment, and to otherwise unnecessary costs and expenses of many thousands of dollars.

12. The further unaccountable anomaly is thereby presented of the Appellate Court's refusal, *at the defendant's instance in the original blackmail litigation,* to review the

groundless and arbitrary action of the District Judge in refusing to dismiss the complaint against said defendant, notwithstanding his showing of the undeniable fact that the record then before the Court DISCLOSED NO GENUINE ISSUE AS TO A MATERIAL FACT; while *the same Appellate Court, in a continuation of the same litigation,* has now declined to review the no less groundless and arbitrary action of the *District Judge who granted the motion of counsel opposed to the petitioner plaintiff,* and dismissed his complaint as to them, on a finding of no genuine issue as to a material fact, when *the record then before the District Judge was undeniably replete with vibrantly genuine issues as to material facts* which, if intelligently presented at any fair and just trial on the merits, would have established the petitioner plaintiff's rights of recovery of *provable damages of more than $200,000.00.*

13. In the course of the trial beginning October 7, 1946, and continuing for about three weeks, including thirteen days of active court proceedings the respondent Canfield and his wife both testified as to her receipt of a telephone call from an unidentified woman, admonishing her to be on her guard lest the defendant Buchanan entice her husband away from her; and as to her later receipt of a written communication bearing the purported signature of the same anonymous misinformant, purportedly apologizing for the impertinence of her call; the avowed and studied purpose of all said testimony having been to implicate the then defendant and present petitioner as having inspired or instigated both the telephone call and the letter. He had actually had no knowledge or information of or concerning either offense against the witnesses, other than that communicated to him by the defendant Frances Dolmage, by telephone, *nearly three weeks after the time of the call by telephone to Mrs. Canfield;* and said defendant is directly charged in the complaint with having herself made the offending call and written the letter in question.

14. Following the petitioner's receipt of the aforementioned communication from the office of the respondent Canfield in 1941, the defendant Dolmage, wife of the petitioner's

dentist and purported friend of many years, volunteered their aid and cooperation in a required investigation of the antecedent history of the defendant Buchanan. Fully relying upon their protestations of kindly and sympathetic interest, he accepted their proffered good offices, and accorded them both free access to his apartment and to all his personal records. They briefly fulfilled his expectations of them in the matter of loyalty and intelligent cooperation; but, almost immediately following an interview between her and the respondent Canfield and his personal attorney Morris Simon, a law partner of the defendant Koenigsberger, in the Summer of 1941, she became *an active and partisan collaborator with the defendant Buchanan and her attorneys, in their confederated efforts to have enriched themselves at the petitioner's expense.* He thereupon requested her, and urged her husband to assist him in persuading her, to discontinue her pretended interest and interference in his affairs; but she persistently refused to do so.

15. Some time thereafter she purloined from his apartment a key to the outer door thereof; and, on a still later occasion of his absence from Washington, she entered his apartment by means of the stolen key, and abstracted therefrom a jewel collection appraised and taxed by the Federal and District Governments as *worth at least $50,000.00.* She was indicted for house-breaking and grand larceny, tried by an indifferent prosecutor, *before the District Judge who thereafter denied the petitioner's motion for a summary judgment and his petition for reconsideration thereof,* despite the fact that *the Court of Appeals had conclusively and forever negatived the presence in the material record of any genuine issue as to a material fact;* and she was promptly acquitted on both counts.

16. She thereupon sued the petitioner for $400,000.00, for alleged false arrest and malicious prosecution; and she and her husband sued him jointly for $16,700.00 for their abortive cooperation in his investigation of the claimant in the blackmail suit. The husband then retired from practice, and they went to Mexico City, where the Chief Investigator for the District Attorney discovered in her posses-

sion certain jewels which she had stolen from the petitioner, and for her theft of which she had been acquitted.

17. She returned with the detective to Washington; and, with her written permission he searched their apartment, and recovered therefrom about $8,000.00 worth of the jewels which she had stolen from the petitioner. Upon his identification thereof before the Grand Jury, she was indicted for perjury, pleaded guilty and was sentenced to the Penitentiary for a term of one to three years. After serving one year of her sentence, she was paroled to the State of Florida for the remainder of the three-year term.

18. The respondent Wood in due time visited her there, and arranged to have her testify at the trial of the blackmail case in Washington. She did so testify on five separate occasions during the trial, *and in every instance was guilty of more flagrant perjury than that for which she had been sentenced to the Penitentiary.*

19. Inspired by the leading questions of the respondent Wood, she charged the petitioner *under oath with perjury, subornation of perjury, bribery of a witness whose deposition was to be read and was read at the trial, mental aberration, psychic irresponsibility* and other failings, crimes and misdemeanors, including the *imputed theft of an official record from the Clerk's Office of the Municipal Court,* well knowing, as the respondent Wood well knew or should have known, that all her said accusations were deliberately false and defamatory; and that she herself had stolen the record in question, cut a strip of paper from the blank space above the signature on an affidavit of defense therein, and forged thereon a typewritten confession of unchastity on the part of her collaborator and co-defendant Buchanan, which she mailed to an attorney acquaintance of the petitioner, with a written request thereon that he deliver it to the petitioner.

20. The sole and obvious purpose of the entire fabric of her perjured testimony was to have furthered the conspiratorial objectives of the defendant Buchanan and her co-defendant lawyers; and, if the Pre-Trial Judge had fairly informed himself as to the facts in those sordid respects,

he would scarcely have granted the respondents' several motions for summary judgments. He might even have accorded to the petitioner the vindication which he freely volunteered to the movants for summary judgments, in his statement (R. 257) that: "A professional man's reputation is particularly valuable to him, and a person who carelessly attempts to besmirch it is subject to severe criticism, to say the least."

21. As hereinabove noted, the blackmail case at long last eventuated in a verdict by the Jury on all counts in the defendant's favor; but it is respectfully submitted as at least passing strange that a just and impartial Federal Judge should have so lightly regarded the long-continued and unmerited persecution inflicted by the respondents upon the petitioner, including his deliberate and widely propagated defamation, and his irretrievable losses and costs of more than $100,000.00, as to have suggested to the petitioner, in the course of his argument on the subject motions, and in response to his statement that the underlying lawsuit had been "a complete victory" for him (R. 251): "Then are you not vindicated? You do not need any more vindication."

FILED

OCT 17 1950

In The

Supreme Court of the United States

October Term, 1950

No. 387

OTIS BELL KING, *Petitioner*,

v.

ARTHUR F. CAPPELLINI, ET AL., *Respondents*.

SUPPLEMENT TO ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Arthur F. Cappellini
Attorney, Pro Se
[illegible]

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IN THE

Supreme Court of the United States

October Term, 1950

No. 327

OTIS BEALL KENT, *Petitioner,*

v.

AUSTIN F. CANFIELD, ET AL., *Respondents.*

OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Come now Austin F. Canfield and Lester T. Wood, respondents in the above entitled action, and file this as and for their opposition to the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

No opinion was rendered in this action by the Court of Appeals; its order sought to be reviewed is set forth on Page 296 of the record.

JURISDICTION

The final order of the United States Court of Appeals was entered on June 23, 1950 (R. 296). The jurisdiction of this Honorable Court is invoked under "Title 28, U. S. C. 1254 (Par. 1)."

REASONS FOR DENYING THE WRIT

1. **The Petition for the Writ of Certiorari Does Not Set Forth Any Tenable Ground or Reason for the Allowance of Said Writ.**
2. **No Federal Question of Substance Was Decided or Passed Upon in Said Action by Either the Trial Court or the United States Court of Appeals for the District of Columbia Circuit.**
3. **The United States Court of Appeals for the District of Columbia Circuit Has Not Rendered Any Decision in This Action in Conflict With Its Own Previous Decisions Nor in Conflict With Decisions of Other Appellate Courts as Contemplated by the Rules of This Court. Rule 38 (b) (c).**
4. **The Petition for Certiorari Filed Herein Is in Violation of Rule 38, Par. 2 of the Rules of This Court.**

ARGUMENT

The Petition for the Writ of Certiorari Does Not Set Forth Any Tenable Ground or Reason for the Allowance of Said Writ.

After the decision and judgment of the Trial Court, wherein summary judgment on behalf of each of the respondents here (defendants below) was entered, petitioner noted his appeal to the United States Court of Appeals for the District of Columbia Circuit. Numerous requests for extensions of time to docket the appeal were requested by petitioner, and, over the opposition of respondents, were allowed by said Circuit Court. (R. 294 et seq.) The last extension allowed to the petitioner, authorized and permitted him to file his brief in support of the appeal to and including March 16, 1950. All extensions of time were granted under Rule 73(g) of the Federal Rules of Civil Procedure and Rule 15 of the United States Circuit Court of Appeals for the District of Columbia Circuit.

Petitioner, as the record shows here, did not comply with the order of the Circuit Court of Appeals by filing his brief on the 16th day of March, 1950, but on the 17th day tendered to the Clerk of said Court the required number of his briefs in support of the appeal. This prevented the Clerk of the Court from accepting the briefs for filing by virtue of Rule 18(f) of said Court which reads as follows:

> "FILING AFTER TIME. No brief shall be filed after the expiration of the time allowed except by leave of Court for extraordinary reasons shown."

On March 23, 1950 (seven (7) days after time for filing had lapsed) petitioner filed a motion for leave to file his briefs *nunc pro tunc* (R. 259). Respondents, on March 28, 1950, filed their opposition to peitioner's motion (R. 268). Said opposition directed the Court's attention

to the fact that the briefs as tendered to the Clerk for filing were in violation of Rule 17(c) in that they failed to set out any jurisdictional statement; also that the printed briefs as tendered violated Rule 17(c) (7) of said Court in that the summary of the argument contained was in clear and certain violation of the Rule.

The opposition of these respondents to the filing of said briefs directed the attention of the Circuit Court of Appeals to the language contained therein and charged that it was written in language of abuse, invective, and unwarranted criticism of not only the appellees in that Court (respondents here) but also the Trial Judge, the former United States Attorney for the District of Columbia (who was now elevated to the Bench of the United States District Court for the District of Columbia) and that it further contained matters of scandal and impertinence. The written opposition then set forth, *in extenso,* extracts from the brief which respondents contended were clearly matters of scandal and impertinence (R. 268 et seq.). Petitioner filed his reply to the objections of respondents on the 4th day of April, 1950 (R. 278); thereafter on May 4, 1950, the United States Circuit Court of Appeals for the District of Columbia, on consideration of petitioner's motion to file his briefs after the expiration of the time allowed, and the opposition of respondents' here, handed down its written order denying petitioner's motion to file his brief out of time, declaring that said brief did contain scandalous and impertinent matter and that it otherwise failed to comply with the Rules of said Court and, sustained respondents' motion to dismiss the appeal, with costs. (R. 293). A petition for re-hearing was filed by petitioner and on June 23, 1950, said petition for re-hearing and re-consideration was promptly denied and judgment entered in that Court for the respondents.

We respectfully direct the attention of this Honorable Court to the fact that petitioner's appeal was dismissed and judgment entered for the respondents only because the petitioner, with numerous extensions of time granted unto him to docket his appeal and file the same with his supporting briefs under the Rules of the Circuit Court, failed to do so under said Rules, and, for the further reason that the briefs as written and tendered contained matters of scandal and impertinence, all in violation of the rules of every Court in the land.

We respectfully call the further attention of this Honorable Court to antecedent action on the part of said Circuit Court of Appeals on the 10th day of January, 1950, wherein that Court on its own motion ordered certain parts of a written motion filed by petitioner, stricken from the record. (R. 295). In that motion petitioner again indulged in language which was scandalous and impertinent (R. 269-270) and the Court dealt with it appropriately.

Had the petitioner filed his briefs in the Circuit Court below within the time prescribed by the Rules, petitioners here would have immediately moved to strike the briefs for the very same reasons advanced in their written opposition to petitioner's motion for leave to file, *nunc pro tunc,* and undoubtedly would have forcibly directed the Circuit Court's attention to the abuse, scandal and impertinence which the petitioner indulged in. This action, as well as the action taken was in full accordance with the decisions of the Circuit Court of Appeals for the District of Columbia. That Court in other instances of this kind, made similar rulings.

U. S. ex rel Hall v. *Lane,* 48 U. S. App. D. C. 279, 285
Davidge v. *Simmons,* 49 U. S. App. D. C. 398, 266 F. 1018
Jordan v. *Bondy,* 72 U. S. App. D. C. 360, 114 F. 2d 599.

We are aware of no decisions to the contrary nor does petitioner cite any for the guidance of this Court. In his petition he seems to take the position that because he filed a motion for leave to file *nunc pro tunc* and this action being taken before respondents filed their attacks upon it, that respondents either moved too late to do so or, there was "no legal warrant for an adjudication or characterization by the Court of any part of the brief as 'scandalous' and 'impertinent' ".

No Federal Question of Substance Was Decided or Passed Upon in Said Action by Either the Trial Court or the United States Court of Appeals for the District of Columbia Circuit.

Petitioner does not claim here that any Federal question is involved and no treatment of the question is given by respondents other than to call the Court's attention to this fact.

The United States Court of Appeals for the District of Columbia Circuit Has Not Rendered Any Decision in This Action in Conflict With Its Own Previous Decisions Nor in Conflict With Decisions of Other Appellate Courts as Contemplated by the Rules of This Court. Rule 38(b)(c).

Although petitioner claims the benefit of a writ of certiorari under Rule 38(b) and insists that the decision of the Circuit Court of Appeals below was in conflict with the decisions of that Court or other comparable Courts, we respectfully submit that there is nothing in the record here to justify that assertion. The Circuit Court below generously provided extensions of time for petitioner to file his brief in complaince with its rules. He failed to do so and then when he attempted to file his brief with the Clerk of that Court, it so patently violated the rules and contained so much matter of scandal and impertinence that the Court, acting consistent with its own decisions, simply refused to permit the briefs to be filed.

We honestly believe that had they been filed in time, the Court, again consistent with its own decisions and consistent with the decisions of Courts of comparable jurisdiction and dignity, would have done the very same thing.

The Petition for Certiorari Filed Herein Is in Violation of Rule 38, Paragraph 2 of the Rules of This Court.

We respectfully contend that the present petition for certiorari clearly violates Rule 38(2) of this Court. The brief as written is neither direct nor concise. It contains an addendum styled "Appendix to petition for writ of certiorari" (R. i-ix inclusive).

We respectfully contend that this appendix contains matters not properly before this Court for consideration. Since the brief itself seems to be in violation of the rule, this fact alone would be sufficient reason for denying the petition.

See:

United States v. *Rimer*, 220 U. S. 547
Furness, Withy & Co. v. *Yang Tsz Insurance Assn.*, 242 U. S. 430;
Houston Oil Co. v. *Goodrich*, 245 U. S. 440;
Layne & Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 392;
Magnum Import Co. v. *Coty*, 262 U. S. 159, 163;
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508

CONCLUSION

We respectfully submit that the petition for certiorari is without merit, and the points advanced for consideration in the petition are not such as are reviewable by this Honorable Court. We respectfully contend that the petition should be denied.

AUSTIN F. CANFIELD
LESTER WOOD
Respondents pro se.

Office-Supreme Court, U. S.
FILED
OCT 31 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 327.

OTIS BEALL KENT, *Petitioner,*

v.

AUSTIN F. CANFIELD ET AL., *Respondents.*

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

OTIS BEALL KENT,
Petitioner, In His Own Behalf.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 327.

OTIS BEALL KENT, *Petitioner*,

v.

AUSTIN F. CANFIELD, LESTER WOOD AND ELIZABETH D. COLEMAN, *Respondents*.

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

In reply to and refutation of the respondents' objections to the allowance of a Writ of *Certiorari* in this cause, the petitioner respectfully submits:

I. As to the TENABILITY of the Asserted GROUNDS for Allowance of the WRIT.

1. *No EXTENSION of DOCKETING term REQUESTED by Petitioner-Appellant or GRANTED by Appellate Court:* The statement on page 3 of the respondent's brief, that "numerous requests for extensions of time to *docket the appeal* were requested by petitioner and * * * allowed by said Circuit Court", is contradicted by the facts of record. The petitioner-appellant had no occasion to make and never made any such request; and none was ever allowed by the Appellate Court.

The instant appeal was seasonably noted on July 1, 1949. (R. 233). Rule 73-(g) of the Federal Rules of Civil Procedure allowed the appellant 40 days thereafter, or until and including *August 10, 1949,* within which to docket his appeal. He seasonably filed the original Record with the Clerk of the Court of Appeals on *August 10, 1949.* (R. 294). The appeal being thereby docketed within the term permitted by the Rules, the appellant required no extension of said term, and none was either requested by him or granted by the Court. The respondents' citations of the Rules under which the only allowed "extensions of time were granted" (Brief, page 3) are likewise unwarranted by the facts of record and are incorrect; no such extension having been granted to the appellant under either of said Rules.

2. *"EXTRAORDINARY REASONS" Required by Cited Rule 18-(f), Precedent to Permitted Filing of Brief after Time Allowed, Clearly Shown by Appellant's Motion but Ignored by Appellate Court:* As noted by the respondents on page 3 of their brief, Rule 18-(f) of the Rules of the Court of Appeals clearly con-

templates the *permissive* filing of briefs *after the time allowed, "for extraordinary reasons shown".*

The "extraordinary reasons" whereupon the appellant moved for leave to file his brief on appeal *nunc pro tunc* are clearly set forth in his motion of which a transcript is embodied in the record (pp. 259-267), and are epitomized in paragraph 2 on page 9 of his brief now before this Honorable Court. As there explained, the *sole* and *final* responsibility for his not having filed his brief on time was *unanswerably* attributable to a default by the Washington Postoffice on its obligation promptly to have delivered the SPECIAL DELIVERY parcel containing the filing copies of the brief, *clearly showing on its face the need for haste in effecting its delivery,* when the briefs had been received by the postal officials in charge of such matters *at least five hours prior to the closing of the Clerk's office* on the ultimate due date.

3. *Motion for Leave to File nunc pro tunc denied on Grounds not authorized by Rules of Court:* There is nothing in the Rules of the Appellate Court which authorized or justified its denial of the appellant's motion for leave to file his brief *nunc pro tunc,* except his failure—if he had as he had not failed—to show the "extraordinary reasons" which explained and should have excused his unavoidable delinquency.

The respondents' objections, therefore, to the granting of the appellant's motion (Brief, p. 4), on the ground of scandal or impertinence *in his brief,* or because of an *omission from his brief* of a "summary of argument" responsive to the appellees' interpretation of Rule 17-(c)-7, or because of his *omission from the brief,* as alleged, of "any jurisdictional statement", are themselves impertinent to any issue presented by the here impending petition for *Certiorari.*

If the Court of Appeals erred in its denial of the appellant's motion for leave to file, its error in that respect, as hereinafter shown, presented a Federal Question properly cognizable by this Honorable Court. Otherwise, the refusal of the Appellate Court to have permitted the filing of the appellant's brief *automatically foreclosed its consideration of any aspect of the form* or *substance* of the brief; the only ground upon which the Court might have justified its denial of said motion having been an *explicit finding* that the appellant had failed to show the "extraordinary reasons" which if shown would have excused his failure to have filed on time.

In the latter event, the *substantive action* bespoken by the Court's condemnation of any part of the brief as scandalous or impertinent ineluctably constituted an *acceptance of the brief* for filing, whereby it was at least constructively incorporated into the record on appeal; as the Appellate Court must be presumed not wilfully to have transgressed the established Rule interdicting its consideration of any matter extraneous to the record before it. Upon that premise, the brief having been at least constructively filed in advance of the appellees' filing of their motions to dismiss the appeal, the dismissal thereof by the Court of Appeals *eo instante* precipitated the indistinguishable *conflict of decisions* discussed on pages 11-12 of the petitioner's brief, as justifying the granting herein of a Writ of *Certiorari.*

4. *Respondents' Enumeration of Asserted Grounds of Denial of Appellant's Motion for Leave to File Brief nunc pro tunc Incorrect and Impertinent:*

(a). *No Extension of Time for Docketing Appeal.*— The respondents' allusion on page 5 of their brief to any extension of time allowed to the appellant to

"docket his appeal" is unwarranted by the facts of record and is incorrect, as he never required, requested or was granted any such extension. (Par. 1, *ante*).

(b). *Allowed Extensions Incorrectly Characterized as "Numerous".*—The implications of the respondents' reference to the allegedly "numerous" extensions of the time within which the appellant might have filed his brief under the Rule are likewise unfounded and factually inaccurate; the successive extensions of the filing term allowed to the appellant being shown by the pertinent Docket entries (R. 295-6), to have been as follows (Petitioner's italics and parenthetical comments):

> I. Sept. 30, 1949: *Per curiam* order allowing appellant to and including *10 days after action on pending motion to proceed on original record,* within which to file brief.
>
> II. Oct. 31, 1949: Appellant's motion for *definitive extension* of time to file printed brief and appendix to a date *not earlier than February 1, 1950.* (*92 days* from filing date of motion). Oct. 17, 1949: (*47 days after date motion filed*). *Per curiam* order allowing appellant to file his brief *on or before February 1, 1950.* (Reducing *anticipated* filing term of *at least 60 days to 45 days*).
>
> III. Jan. 20, 1950: Appellant's motion to extend time to file brief and appendix to *60 days subsequent to action on this motion.* Feb. 8, 1950: *Per curiam* order allowing appellant *to and including March 16, 1950,* within which to file brief. (Reducing *requested* term of *60* days to *36* days).

The respondents' characterization of the *three aforementioned extensions* of time as "numerous extensions", therefore, either reflects a misconception of the generally accepted meaning of the term "numerous", or constitutes an exaggeration of the established facts.

(c). *Petitioner's Tender of Brief for Filing Sanctioned by Court Rules.*—The respondents' statement on

page 5 of their brief that the appeal herein was dismissed because of the appellant's failure to have filed his brief "under the Rules of the Circuit Court" is incorrect and impertinent, in that his brief WAS duly tendered for filing "UNDER SAID RULES", with a clear and truthful exposition of the "extraordinary reasons" which had precluded its timely filing THEREUNDER. The respondents' correlate assertion that the appeal was dismissed "for the further reason that the briefs as written and tendered contained matters of scandal and impertinence, all in violation of the rules of every Court in the land", is likewise inconclusive as an objection to the allowance of the impending petition for *Certiorari*.

(d). *Appeal NOT dismissed because of scandal or impertinence in Brief of which Filing Refused.*—The Court's refusal to have permitted the delinquent filing of the subject brief was undeniably within its sound discretion, subject only to a just and orderly review of its said refusal as involving an abuse of said discretion; but, having denied to the appellant the relief in terms provided by its own Rule 18-(f), and having dismissed the appeal because of the failure of the Postoffice to have delivered the brief for filing prior to the lapse of its due date, it was clearly not within the province of the Appellate Court to consider any *substantial* aspect of the brief, the filing of which it had prohibited, and which therefore was not of record before it.

5. *No record action taken by Appellate Court herein on January 10, 1950*: The respondents' allusion to the purported action of the Appellate Court, in having "ordered certain parts of a written motion filed by petitioner stricken from the record", is purely gratuitous and palpably impertinent. No order was entered

and no other action of record taken by said Court on January 10, 1950 (R. 295-296); and there is nothing now of record herein which might have justified a statement or an implication to the contrary.

In a superabundance of fairness to the respondents, even though their cited comments are *dehors* the record, it may be noted that an order herein entered by the Court of Appeals on December 17, 1949, extending the filing term for the appellant's brief, directed also that certain portions of the motion thereby adjudicated be stricken from the record; but, if the facts in that respect should be of interest to any Justice of this Honorable Court, the petitioner is prepared to show, with the permission of the Court, that *every word so stricken* by the Appellate Court was either *justified by precedential comments by this and other Courts* in other cases, or was *directly responsive to an admonition theretofore addressed to the then defendant and present petitioner by a Judge of the District Court.* If the Court of Appeals had been aware of the determinative facts, it is respectfully submitted as at least unlikely that any part of the controverted text would have been stricken as either scandalous or impertinent.

6. *Respondents' Objections presupposing Conditions Opposed to Facts Inapposite and Impertinent*: The gratuitous observation on page 5 of the respondents' brief, that they "*would have immediately moved* to strike" if the petitioner's unfiled brief had been seasonably filed, is *aliunde* and impertinent.

7. *Decisions Cited by Respondents Inapplicable to Facts of Record*: The petitioner admits some doubt as to the significance of the respondents' reference on page 5 of their brief to "similar rulings" in "other

instances of this kind"; but none of the cited decisions presumably exemplifying the rulings in question has any determinative bearing upon any issue presented by the petitioner's brief herein. Thus:

In *Hall* v. *Lane,* 48 App. D. C. 279, the Court had found *"no basis * * * in the record"* for an intimation in the stricken brief that "the Land Department of the Government had been controlled in certain cases by sinister influences"; and the brief therein had been stricken *only "after the argument at the bar".* In *Davidge* v. *Simmons,* 49 App. D. C., 398, 266 Fed. 1018, the brief was stricken on the stated ground that the "reproachful allusions" therein to the opposing party were *unsupported by the record;* and the cited action was taken only *after the case had been decided on its merits.* In *Johnson* v. *Bondy,* 72 App. D. C., 360, 114 Fed. (2), 599, a decision also had been rendered on the merits; and the language ordered stricken from the brief comprised at most less than two and one-half pages of the printed text, and not the entirety of the brief, as in the instant case.

No substantive right of any of the offending parties in the cited cases was either denied or abridged by the Court, because of a recourse by said party to the objectionable language stricken from their several briefs; *all said rights having been adjudicated on their merits in advance of summary action by the Courts.* The Appellate Court's refusal to permit the appellant to file his brief, upon his showing of the extraordinary reasons whereupon he had sought to justify said action, unlike the situations environing all the other aforementioned parties, inevitably and arbitrarily divested him of his constitutional right to his day in Court; and even a casual reading of his pleadings on

appeal will dispel any doubt as to the *basic justification in the record* of every word to which the respondents had noted an objection.

The three aforementioned decisions, therefore, are wholly inapplicable to any issue under present advisement; and none of the cited authorities suggests a semblance of justification for the Court's refusal to permit the filing of the appellant's brief *nunc pro tunc, on any ground other than a specific finding* by the Court that he *had failed to show the "extraordinary reasons"* which he must have shown precedently to the Court's acceptance and filing of his delinquently tendered brief.

8. *Correction of Respondents' Imputation and Restatement of Petitioner's "Position"*: The petitioner's premise in support of his request herein for *Certiorari* is not, as imputed by the respondents on page 6 of their brief, that they had "moved too late" in their motions to dismiss his appeal, but that his brief, having been tendered in good faith for filing, in advance of their motions to dismiss, should have been accepted and filed, and not excluded from the record on the ground that it had been tendered too late for filing; this position being amply supported by the decisions of this Honorable Court, the Court of Appeals for the District of Columbia and the Appellate Courts in other Federal Circuits severally cited and discussed on pages 22-25 of his brief in support of his petition for *Certiorari*.

The respondents have likewise misconceived the import of the clause which they have excerpted from the petitioner's brief, wherein he had challenged the "adjudication or characterization by the Court of any part of the brief as scandalous or impertinent". In

lifting the *quoted phrase* from the *context* of the *paragraph* in which it occurred, they have excluded the clarifying word "therefore"; and in so doing they have perhaps unintentionally but none the less effectively distorted the intended meaning of the text, which was merely that IF the Appellate Court had CORRECTLY excluded the brief from the record, the *entirety* of its *substance* was *dehors* the record, and was thereby immunized from censure by the Court.

II. As to the Impendency in the Record of Substantial Federal Questions.

1. *Respondents' Negation of Unparticularized Federal Questions Dehors the Record*: The respondents' comment on page 6 of their brief, that the "petitioner does not claim here that any Federal question is involved", may be held to have refuted any objection implied in their allusion to the subject, and in any event is *dehors* the record. The considerations, however, impelling the respondents to "call the Court's attention to this fact" may justify if not require a brief elaboration of the facts recited in the petitioner's brief, which by inevitable implication at least, present *substantial Federal questions.*

2. *Federal Questions Implicit in Factual Issues Presented by Petition for Certiorari*: In drafting his petition for *Certiorari* the petitioner believed, as it is still his considered belief, that ample grounds for the issuance of the Writ would be and have been shown by his particularization of those provisions only of Rule 38-5-(b) which relate (a) to *conflicting decisions of identical matters* and (b) to *departures from the accepted and usual course of judicial proceedings.* While he did not in terms, therefore, refer to any Federal question *implicit* in the situation presented by his

petition, as an *additional* reason for granting the Writ, he did aver in his brief, and he now respectfully reaffirms his position that the dismissal of his complaint by the District Court and of his appeal by the Court of Appeals deprived him of his constitutional right to his "day in court" (Brief, p. 18); thereby in effect presenting a justiciable Federal Question as to a denial of the due process vouchsafed to him by the Federal Constitution.

3. *Petitioner denied his Day in Court and Due Process*: Amendment V to the Federal Constitution guarantees that: "No person shall * * * be deprived of * * * property, without due process of law;". The property rights so guaranteed have been held to comprehend a chose in action. (*Chemical Foundation* v. *Du Pont,* 29 Fed.-2, 597; Aff. C. C. A., 39 Fed.-2, 366; Cert. Granted, 282 U. S. 819; Affirmed, 283 U. S., 152; *Mooney* v. *Miller,* 195 N. Y. S., 437; *Fisk* v. *Leith,* 299 Pac. 1013, 137 Ore. 459); including a right of action for damages (*Martinez* v. *Fox Valley Bus Lines,* 17 Fed. Supp. 576; *Griffin* v. *Wilcox,* 21 Ind. 370; *Williams* v. *Atlantic Coast Line R. Co.,* 69 S. E. 402, 153 N. C. 360).

The complaint herein (R. 1-64) dismissed by the District Court presented *bona fide* claims whereupon the plaintiff and present petitioner had asserted provable damages of more than $200,000.00; his so asserted claims clearly constituting a *property right* within the protective purview of the Federal Constitution.

A party litigant has not had his "day in court" until he has been afforded an "opportunity to be heard". *Helis* v. *Ward,* 308 U. S. 365; *Old Wayne Mut. Life Assn. of Indianapolis, Ind.,* v. *McDonough, Ind.,* 204 U. S. 8; *Fisher* v. *Jordan,* 32 Fed. Supp. 608. As

stated by the Court in *Leininger* v. *Reichle,* 148 N. E. 384, 389, 317 Ill. 625: "It is a principle that lies at the foundation of all jurisprudence in civilized countries that *a person must have an opportunity of being heard* before a court can deprive such person of his rights. This rule is applicable to all proceedings * * *; and *no court has power to divest a person of a vested right until he * * * has had a reasonable opportunity of being heard in defense of his rights.*" (Petitioner's Italics).

As clearly shown by the record, the Pre-Trial Judge dismissed the petitioner's action against the respondents and their cited codefendants, on the stated ground that his complaint presented *no genuine issue as to a material fact* (R. 230-233); when as a matter of undeniable verity there were then of record before the Court *as many such genuine issues as there were charges in the complaint against all the named defendants and denials in their several answers of all said charges.* (R. 1-90). The Pre-Trial Judge had not only made no effective effort to have read or otherwise informed himself as to the facts, a comprehensive knowledge of which was indispensable to his proper exercise of his judicial functions in the case (R. 236-254); but he peremptorily refused to permit the plaintiff and present petitioner in his own behalf to acquaint him with the determinative facts concerning which the plaintiff's attorney was wholly uninformed and which he had frankly admitted himself unable to discuss. (R. 248-253). The petitioner plaintiff was accordingly denied his "reasonable opportunity of being heard in defense of his rights", and was thereby divested of his constitutional right to his "day in court".

4. *Federal Question Presented by Refusal of Appellate Court to Permit Appellant's Filing of Delinquent Brief Pursuant to Rule 18-(f):* The Court of Appeals, by its promulgation of Rule 18-(f), has reserved to itself the right to permit the filing of delinquent briefs in any case wherein "extraordinary reasons" for a failure to have filed on time are shown. The Court of Appeals has further declared that all its Rules, including of course Rule 18-(f), are to be accorded the effect and force of statutory law. (*Bradley* v. *Pace,* 183 Fed.-2 806; and *Hill* v. *Hawes,* 132 Fed.-2 569, 76 U. S. App. D. C. 308). Any action by the Appellate Court, therefore, involving an interpretation, application or construction of Rule 18-(f) or of any of its other Rules, *particularly those involving any issue of time or limitation,* is juridically analogous to action under a Federal Statute, and presents a Federal Question within the purview of Rule 38-5-(b) of this Honorable Court.

III. As to Established Conflict of Decision Hereby Sought to be Reviewed With Prior Decisions of Appellate Court Below and of Other Appellate Courts.

1. *Respondents' Objections refuted by Antecedent Showings herein and in Petitioner's Original Brief in Support of Petition for Certiorari:* The respondents' pronouncement on page 6 of their brief that "there is nothing in the record here to justify" the petitioner's contention that the decision hereby sought to be reviewed is in conflict with prior decisions of the Court below and of other Appellate Courts, ignores the dismissal of the instant appeal *on grounds never before considered by the Court below* as justifying the dismissal of an appeal, and *peremptorily rejected by the Court of Appeals for the Eighth Circuit,* when urged

in support of a comparable motion to dismiss; as fully discussed on pages 22-27 of the petitioner's original brief, and under caption I of this brief, *ante.*

2. *Decision of Appellate Court below NOT "Consistent with Its Own Decisions" or with Decisions of other Appellate Courts in Comparable Situations:* The assertion by the respondents on page 6 of their brief that the decision of the Appellate Court now sought to be reviewed is "consistent with its own decisions" in other cases, is unfounded and palpably incorrect. So far as an exhaustive review of the published decisions has disclosed, *the Appeals decision in this case is the only instance in which any Court of Appeals has ever sought to justify its refusal to permit the filing of a brief initially tendered after its filing due date, but prior to the filing of an opposing motion to dismiss, on the ground that it contained scandalous and impertinent matter and did not conform with the Rules.*

3. *Conditions Opposed to Facts of Record, even though "Honestly Believed" by Respondents, Impertinent to Instant Issues:* The *impression* expressed by the respondents on page 7 of their brief, that, if the petitioner's brief on appeal had been filed on time, they "honestly believed" the Court below or any other Court "of comparable jurisdiction and dignity would have done the very same thing", propounds a condition opposed to the facts, in that IF the brief "had been filed on time", there would have been no occasion for any Court to "have done the very same thing" which the Court below has done, and which it is honestly believed has required and justified the petitioner's impending request for corrective action by this Honorable Court.

IV. As to Conformance of Impending Petition With Governing Rules.

1. *Impending Petition no less "Direct and Concise" than Required for "Complete Disclosures" Concerning Subject Controversy:* The respondents' objections to the petitioner's brief as "neither direct nor concise", within the limitations of Rule 38-(2), reflect an apparent misconception of the meaning of the quoted terms. The petition in its every word and phrase is meticulously *directed* to a strict observance of the conditions *indicated* in Rule 38-(5) as justifying the granting of a Writ of *Certiorari;* and the petitioner, in drafting his petition, consistently sought to avoid any recourse to an indirect or circumlocutory expression which might have been objectionable either to this Honorable Court or to any of the respondents.

The latter have apparently confused the word "concise", as employed in Rule 38-(2), with the connotation of the words short or brief; but a literal conformance with any such restrictive interpretation of the word "concise", as determining the format of the instant petition, would have been inconsistent with, and would have defaulted on, the specifications of the "clear, definite and complete disclosures concerning the controversy" which have been held to be indispensable in a petition for *Certiorari.* (*Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S., 508.)

In order not unduly to have protracted the text of the petitioner's supporting brief, and at the same time to have presented all the facts which might be deemed "essential to ready and accurate understanding of the points requiring our (the Court's) attention"; (*Furness, Withy & Company* v. *Yang Tsze Insurance*

Association, 242 U. S. 430) the petitioner, conceiving a possibility that the Court might regard a disclosure of the determinative facts involved in the antecedent litigation as indispensable to a correct adjudication of the now impending issues, appended to his brief a *concise abridgement of the complaint,* the arbitrary dismissal of which by the District Court provided the basis for the appeal in turn dismissed by the Order of the Appellate Court now hereby sought to be reviewed. As the entire appendix is based upon and supported by the Record submitted with the impending petition for *Certiorari,* the contention of the respondents that "this Appendix contains matters not properly before this Court for consideration" is opposed to the facts and is clearly untenable.

2. *Precedential Rulings cited by Respondents in Opposition to Petition for Certiorari Consistent with and Clearly Support Text and Format of Petition:* In all but one of the six decisions cited by the respondents on page 7 of their brief, *Certiorari* had been granted upon the Court's misconceptions of the grounds upon which the Writ had been severally sought, and had been dismissed as "improvidently granted", only *after* the Court had ascertained the *true situations* underlying each subject controversy, and had reaffirmed its requirement that petitions in all such cases MUST contain "complete disclosures" of all determinative facts. The sixth of the respondents' citations (*Magnum Import Company* v. *Coty,* 262 U. S. 159) is not in point, in that the cited case involved no application for *Certiorari.*

3. *Respondents Failure to have Controverted Petitioner's Imputations of "Far Departures" by Appellate and District Courts from Accepted and Usual*

Course of Proceedings, Tantamount to Concession that, as respects Unanswered Argument at least, Petition should be sustained as Conforming with Governing Rules:

In *Campbell* v. *Ingram,* 174 Pac. 366, 37 Cal. App. 728, it was held that "Where appellant fails to reply to appellee's argument, *the court may infer that appellant deems the argument unanswerable";* and, by a parity of reasoning, it may likewise be inferred, where the appellee fails to reply to an argument in the appellant's brief, that the appellee deems the argument unanswerable, and therefore concedes it as established by the record. In 4 *C. J. S., Appeal and Error,* Section 1344, page 1937, the statement is noted that "It is a principle of general application under rules of court regulating briefs that statements in appellant's brief, which the rules provide that it shall contain, will be taken as true where * * * such statements are not controverted in appellee's brief." (Citing numerous cases).

CONCLUSION

It is thereupon respectfully submitted that, inasmuch as the respondents have presented in their brief no *tenable objection* to the granting of the requested Writ, the same should be and is prayed to be allowed.

Respectfully submitted,

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